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In the Supreme Court of the United States

October Term, 1978

No. 78-460

LIS, EDWIN J., JR., LIS, DEBBIE T. and LIS, JASON, Infant, by His Father, EDWIN J. LIS, JR.,
Petitioners

vs.

THE ROBERT PACKER HOSPITAL, GUTHRIE CLINIC, LTD., ALLEN, DR. WAYNE H.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY S. WENDER,
Wender Building,
2026 Eye Street, NW,
Suite 103,
Washington, D.C. 20006,
202—484-8953
Attorney for Petitioners.

Of Counsel:
DAVID B. KEEFFE
DESISTI, KEEFFE AND ROSH,
325 N. Keystone Avenue,
Sayre, PA 18840
717—885-0207

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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Petitioners

vs.

THE ROBERT PACKER HOSPITAL, GUTHRIE CLINIC, LTD., ALLEN, DR. WAYNE H.

PETITION

Petitioners, Edwin Lis, Jr. et al., respectfully petition that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 23, 1978.

OPINIONS BELOW

The judgment order of the Court of Appeals is unreported but appears in the appendix at p. 21, infra. Motion for new trial was denied by the United States District Court for the Middle District of Pennsylvania without opinion.

JURISDICTION

The order of the Court of Appeals was entered on June 23, 1978. This petition for a writ of certiorari was filed within 90 days of that time. This Court's jurisdiction is involved pursuant to 28 U.S.C. 1254 (i).

QUESTION PRESENTED

Whether the appellants were required to demonstrate prejudice from trial court errors which affected the substantial rights of the parties?

STATUTORY PROVISIONS INVOLVED

The Federal Rules of Evidence, Pub. L. 93-595, §1, January 2, 1975, 88 Stat. 1936 (28 USCA) Rule 611 (b), provides as follows:

> "(b) Scope of Cross Examination. Cross examination should be limited to the subject matter of the direct examination and matters effecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination".

Rule 42 (b) of the Federal Rules of Civil Procedure provides as follows:

> "(b) Separate Trials.
>
> The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counter claim, or third party claim, or of any separate issue or of any number of claims, cross claims, counter claims, third party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. As amended February 28, 1966, eff. July 1, 1966. (28 U.S.C.A. Rule 42 at p. 416)"

28 U.S.C. Section 2111 provides as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court entered on May 9, 1977 in favor of the defendants after the bifurcated trial of a case alleging that professional negligence of Dr. Wayne H. Allen caused severe mental retardation of the infant plaintiff, Jason Lis. On the tenth day of the liability phase of the trial, the jury answered special verdict questions submitted to them by the presiding Judge, the Honorable Malcolm Muir, and found, inter alia, as follows: (1) Dr. Wayne H. Allen negligently diagnosed or negligently treated Jason Lis in September, 1974; (2) Dr. Allen's negligence was not the proximate cause of the injury to the plaintiff; (3) the technicians of the Robert Packer Hospital were negligent; (4) their negligence was not the proximate cause of the injury to the plaintiff, Jason Lis (A 127-130).*

Jason Lis, a full term child, was born to Debbie T. Lis and Edwin J. Lis, Jr. on the 18th of May, 1974 at the Robert Packer Hospital, Sayre, Pennsylvania. There were no abnormalities noted at birth and the child received normal pediatric care during the first four months of life. The infant's pediatrician, Dr. John Pacanowski, an employee of the Guthrie Clinic, examined the child six weeks after birth on August 3, 1974 and on September

*References are to Appendix filed in the Court of Appeals for the Third Circuit.

3, 1974 and found the child to be developing all the social responses acceptable for a child age 3-1/2 to 4-1/2 months (A 54-55).

For background purposes, it is important to note that the Guthrie Clinic is a professional corporation of approximately sixty-five doctors located in Sayre, Pennsylvania. All of the doctors employed by the Guthrie Clinic have hospital privileges at the Robert Packer Hospital and, in September, 1974, the offices of the doctors were in the physical plant of the Robert Packer Hospital (A 43-53).

On September 19, 1974, Jason Lis was taken to the emergency room of the Robert Packer Hospital at 3:30 p.m. due to an episode of possible aspiration of food and concomitant difficulty in breathing (A 22-25). Blood work was taken at the emergency room of the hospital and the child was admitted under the care of Dr. Wayne H. Allen, named defendant herein. Dr. Allen was an employee of the Guthrie Clinic and was the physician "on call" for unscheduled admissions.

The blood work performed on admission to the emergency room revealed that, at the time of admission, the infant was acidotic and suffered from an extremely high blood sugar level, known medically as hyperglycemia. The blood sugar reading at that time was 367; a normal reading for an infant child would be in the range of 100-120.

Based on this and other available data, Dr. Allen made a diagnosis that the child was diabetic and at the time of admission was suffering from diabetes mellitus with diabetic acidosis (A 81-85). Without seeking for-

mal consultation with any other physicians, without ordering any further blood work to determine the natural progress of the infant's blood sugar level, and relying on blood work obtained approximately five hours earlier, Dr. Allen injected fifteen (15) units of regular insulin into Jason Lis at approximately 9:20 p.m. on September 19, 1974 (A 86-96). This action was taken to treat the diagnosed problem of diabetes mellitus and diabetic acidosis and the plaintiffs maintained throughout the trial that the dosage was excessive.

Dr. Allen's only order for monitoring the infant's sugar level, after the administration of insulin, which has a peak effect of 2-4 hours, was to check the infant's void (urine) (A 86-96). The child did not void until 3:30 a.m. on September 20, 1976, and the urine at that time was negative for sugar and acetone. Due to the minimal content of the doctor's orders for monitoring the child, there was no blood sugar reading taken at the time when the insulin was at its peak effect. Repeat blood work was not done until 7:30 a.m. and that blood work indicated a blood sugar level of 30, an abnormally low reading indicating a medical condition known as hypoglycemia (A 87-98). As soon as these results were received, the defendant, Dr. Allen, took remedial measures to elevate the blood sugar (A 99-100).

Upon the plaintiff's mother arriving at the hospital at 8:30 a.m., she observed the classic, clinical signs of hypoglycemia exhibited by her child. Jason was very stiff, sweating profusely, had his arms outstretched and possessed a blank stare. In addition, she was told by the nurse on duty that, after the administration of insulin, Jason's blood sugar had dropped way below normal (A

26-27). There is no dispute that the infant, Jason Lis, is not a diabetic and that the original diagnosis of diabetes mellitus and diabetic acidosis was erroneous (A 101-102).

At approximately 3:00 o'clock on the afternoon of September 20, 1974, Jason commenced experiencing seizure activity during which his arms would be stiff and shaking, his eyes would flutter, and his body subjected to a general series of jerking movements for 2-3 minutes. This seizure activity continued throughout the balance of Jason's hospital stay, controlled somewhat by the use of anticonvulsant drugs (A 56-57). On October 14, 1974, Jason was transferred to the Children's Hospital in Boston, Massachusetts for three days of tests and observation.

At the present time, Jason is institutionalized at St. Joseph's Children's and Maternity Hospital in Scranton, Pennsylvania where he is nonambulatory, suffers from severe brain damage, mental retardation, and probable blindness (A 8-16).

By virtue of a pretrial order dated April 4, 1977, the liability and damage portions of the trial were severed. This action was pursuant to the trial judge's practice of bifurcating (severing issues of liability and damages) all personal injury negligence cases. The trial judge did not consider the particular facts of the case before him and the overlapping entanglement of liability and damage issues.

The case was called to trial before a jury on April 21, 1977 at Williamsport, Pennsylvania. The plaintiffs-appellants contend that Dr. Allen's negligence in failing

to secure an adequate factual basis on which to render a diagnosis (causing him to form an erroneous diagnosis), his negligence in giving a dose of insulin which was excessive for the child's height and weight, his negligence in giving a dose of insulin based on laboratory data obtained five hours prior to administration, and his negligence in failing to properly monitor the child, was the factual cause of the severe hypoglycemia that the infant child suffered on the morning of September 20, 1974. Appellants further contend that the episode of hypoglycemia caused a dormant, preexisting brain abnormality to manifest itself, resulting in the seizure disorder and eventual massive brain damage and retardation of the infant child, Jason Lis.

The defendants-appellees maintained that, despite the fact the child was active and alert prior to September 19, 1974, his condition was not caused in any way by the negligence of Dr. Allen, and, further, claim that Dr. Allen was not negligent in any manner.

Inter alia, the appellants have raised on appeal the propriety of the trial court's grant of an unlimited scope of cross-examination to the defendants' counsel while Dr. John Pacanowski, an employee of defendant, Guthrie Clinic, was on the stand during the plaintiffs direct case.

Prior to plaintiffs' own expert medical witness testifying, the plaintiffs called Dr. John Pacanowski, the infant plaintiff's pediatrician during the first four months of life to the stand. A factual witness for the plaintiffs, Dr. Pacanowski established the normality of Jason's development during early pediatric care through September 3, 1974. Dr. Pacanowski described the infant's development from mere reflex actions to the more cognitive states of development (A 39-42). Dr. Pacanowski described first-hand knowledge of the onset of seizure activity and other factual details during the balance of Jason's stay in the Robert Packer Hospital. On "cross-examination" over plaintiffs' constant objection (A 75-76), the trial judge announced that he would permit inquiry into matters beyond the scope of direct examination (A 60); allowed defense counsel to qualify Dr. Pacanowski as an expert witness for the defense (A 70-74); allowed Dr. Pacanowski to express his opinion that Dr. Allen was not negligent in the administration of insulin (A 77-80), to testify on the issue of causation (A 61-63), and to testify generally as an expert witness on all phases of the case (A 64-69).

Also assigned as error is the trial court's pretrial order bifurcating the liability and damage phases of the trial and specifically the manner in which this ruling was applied by the Trial Judge to restrict the presentation of testimony by the plaintiffs. Initially, it is important to note the reason the case at bar was bifurcated: "I bifurcated it because we bifurcate all negligence cases, . . ." (A 30). The application of this ruling constantly proscribed the plaintiff from showing the degree of injury to the infant child (A 58), discussion by witnesses as to the prognosis of the child (A 32), and a film presentation showing the present condition of the child (A 30). The jury was never presented with the facts that the infant plaintiff is presently severely mentally retarded, institutionalized, nonambulatory and probably blind.

The application of the bifurcation order, preventing discussion as to the degree of damage to the child, pro-

hibited any and all discussion, by any and all witnesses on direct and cross-examination, as to the relationship between the negligent action of the defendants and the degree of damage the child suffered. No discussion in excess of one month of September, 1974 was permitted in demonstrating the extent of the infant's debilitated condition, nor was any reference allowed as to the child's present condition. The effect of the bifurcation order was to prohibit an exploration of the connection between the child's preexisting condition, the defendant's negligence, and the child's present condition. Considering the fact that any preexisting abnormality of the child did not in any way affect him prior to September 20, 1974, exploration of the area was crucial for the plaintiffs-appellants.

Judgment for the appellees was entered following the answers to special verdict questions and motion for new trial was filed and denied by the District Court. An appeal was filed to the Third Circuit Court of Appeals which did not permit oral argument in this case. Their opinion, while recognizing that serious trial errors were committed, failed to grant the appellants a new trial.

REASONS FOR GRANTING WRIT

In requiring the appellants to demonstrate prejudice from trial court errors which affected the parties' substantial rights, the Court of Appeals ignored the established standard for reversible error promulgated by the United States Supreme Court.

A. The Trial Court's Errors

The trial court completely ignored the congressional mandate of Federal Rule of Evidence 611(b) adopting the narrow scope of cross-examination. The ruling of the court permitted the appellees to present to the jury, under the guise of cross-examination, their entire defense to the plaintiffs-appellants' claims. This occurred early in the trial and before the plaintiffs-appellants had presented any medical opinion testimony supporting their claim. The ruling totally disrupted the orderly flow of the trial and placed an unfair burden of persuasion on the appellants before the jury.

Prior to trial, the court had severed for trial issues of liability and damages, purportedly in accordance with Federal Rule of Civil Procedure 42(b). However, the trial judge exercised no discretion in making this decision. The ruling was implemented consistent with the Judge's normal practice in personal injury negligence cases, and contrary to the Rule's plain command to always

preserve inviolate the parties' right to a trial by jury as declared by the Seventh Amendment to the Constitution. What a proper application of the Rule requires is set forth in 35 B, *C.J.S., Federal Civil Procedure,* Sec. 917 at page 246:

> ". . . this calls for close individual analysis of the factual and legal features of each case, and a pragmatic evaluation of the arguments pro and con on the issue of severance. There is no rule of thumb that fits all cases. However, since separate trials ordinarily add to the burden of litigants and of the courts, they are not favored and will not be granted without an adequate reason therefor.
>
> While only the furtherance of convenience in avoidance of prejudice are mentioned in the rule as justifying separation, it is inherent in the rule that separation must also serve the ends of justice."

The Court of Appeals held that the trial court's deviation from the prescribed rules were serious errors and prescribed a prophylactic rule granting automatic reversal in future cases containing such violations. However, the Court of Appeals held the record did not demonstrate prejudice to the appellants; and, obviously, imposed upon the appellants the burden of demonstrating prejudice.

B. The Proper Standard for Harmless Error

The standard for determining reversible error has been enunciated in *McCandless v. U.S.,* 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 (1936), and *Kotteakos v. U. S.,*

328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). An erroneous ruling which related to the substantial right of the parties is grounds for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *McCandless v. U. S.,* supra, 298 U.S. at 347, 348, 56 S. Ct. at 764, 766, 80 L.Ed. 1205 (1936). The same standard is to be employed to assess error in civil and criminal cases. *Conway v. Chemical Tank Lines,* 525 F.2d 927 (5th Cir. 1976). Where the error relates to a substantial right of the appellant, demonstration of prejudice is not required. *Citron v. Aro Corp.,* 377 F.2d 750 (3 Cir. 1967). On the contrary, before technical errors warrant reversal, the appellant must demonstrate his case has been prejudiced. *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943); *NLRB v. Safeway Scaffolding,* 382 F.2d 273 (5th Cir. 1967).

The Federal Appellate Courts are also governed by the "Harmless Error" Statute, 28 U.S.C. Sec. 2111, which provides as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The courts have held that the statute does not change the rule established by *McCandless,* supra, and *Kotteakos,* supra, *U. S. v. Meagly,* 239 F.2d 637 (7th Cir. 1957).

C. The Standard Used by the Court of Appeals

The Court of Appeals held that the trial court failed to heed the direct congressional command to apply the narrow scope of cross-examination as set forth in Federal Rule of Evidence 611(b). In addition, the Court of Appeals held that the trial court's automatic severance of liability and damage issues was contrary to the proper use of Federal Rule of Civil Procedure 42(b). The court considered the deviations from established rules serious enough to require the promulgation of a prophylactic rule of automatic reversal governing similar aberrations in the future.

Appellants assert that the Court of Appeals impliedly acknowledged that the errors affected substantial rights of the parties. This prompted the threat of "draconian remedies" in the future. However, the Court of Appeals never discussed nor referred to the established standard for determining if established error requires reversal. Instead, the court merely dismissed the appeal with the sweeping statement that the appellants had failed to demonstrate prejudice and created a new prophylatic rule. The decision patently ignored the established standard for assessing error and is in conflict with prior decisions of the United States Supreme Court.

D. The Trial Court's Errors Affected the Substantial Rights of the Parties

What is a substantial right has not and probably can not be the subject of precise definition. However, can

it be argued that the erroneous rulings in the case at bar did not affect the substantial rights of the appellants?

This appeal involves the appellants' right to a fair, impartial and orderly trial and their right to a trial by jury on all issues presented by the case. As the Court of Appeals noted, the Federal Rule of Evidence under review ". . . establishes a predictable and orderly procedure for the presentation of the various sides of a dispute." In formulating trial strategy, the practitioner assumes the enunciated rule will govern his case. As apparent from the statement of the case, the appellants' reliance in this instance was misplaced and affected their substantial right to present their theory of the case prior to that of the defendants.

Additionally, the authorities recognize, and studies demonstrate, that the bifurcation of liability and damage issues produces a substantial change in the nature of a jury trial itself. For example, in personal injury litigation, while defendants win in 42% of the cases tried routinely, they win in 79% of the cases in which the liability issue is submitted alone. *Federal Practice and Procedure,* Wright and Miller, Chap. 7, Sec. 2389, at page 293. For this reason, and in view of the Rule's plain command to hold inviolate a party's right to trial by jury, separate trials under Federal Rule of Civil Procedure 42(b) are not the usual course and should be resorted to only when informed discretion determines the separation will achieve the purpose of the Rule. *Moss v. Associated Transp., Inc.,* 344 F.2d 23, 26 (6th Cir. 1965); *Swofford v. B. & W. Inc.,* 336 F.2d 406, 415 (5th Cir. 1964).

Research indicates that it was never intended that Federal Rule (42b) be used in routine cases. 5 *Moore, Federal Practice*, Sec. 42.01 (2), 42.03 (1952).

In the case at bar, the appellants' case not only was bifurcated, but was severed without any consideration of the overlapping medical evidence on issues of liability and damages, of whether the extent of the injury had an important evidentiary bearing on the question of liability, nor whether the legal principles relied upon by the appellants unified the questions of liability and damages. During trial, the judge arbitrarily terminated the history of the injury one month after hospitalization.

Appellants' case involved overlapping medical testimony on the issues of liability and damages. Further, the legal theory relied upon by the appellants made the severance of the issues patently unfair. The legal theory relied upon is that "where negligent conduct concurs with an act of nature, the defendant is liable unless he can show the other cause would have produced the injuries independent of the negligent conduct (A 125, 126). *Bodick v. Harcliff Mining Co.*, 280 Pa. Superior Ct. 471, 474, 22 A.2d 615 (1966); *Majors v. Broadhead Hotel*, 416 Pa. 265, 271, 205 A.2d 877 (1965). The jury was instructed on this theory but without a complete exploration of the pertinent facts (A 125, 126).

The Federal Courts have consistently held that errors which affect the method and manner of trial presentation involve the substantial rights of the parties. *Degelos v. Fidelity and Casualty Co. of N. Y.*, 313 F.2d 809 (5th Cir. 1963), held the refusal to allow a party to call a witness as an adverse witness, consistent with the Federal Rules of Evidence, reversible error. The requirement of demonstrating prejudice was not required where a party was denied a tool of advocacy.

In *Brown v. DeVicchis & Sons, Inc.*, 552 F.2d 545 (3 Cir. 1977), the trial court interfered with the order in which the jury was presented evidence during the plaintiff's case. "He was deprived of the opportunity to present evidence on his theories of negligence in his own way in his own part of the case." *Brown*, supra, 552 F.2d at 548. This was held to be reversible error.

The trial of the plaintiff's case in *Citron v. Aro Corp.*, 377 F.2d 750 (3 Cir. 1967), was interrupted by several recesses, prohibiting an orderly and effective presentation. Citing the principle of *McCandless v. U.S.*, supra, relating to harmless error, the Court of Appeals held that substantial rights of the parties were affected and concluded as follows:

> ". . . the question for decision is whether the error may be disregarded as harmless in the absence of an affirmative showing of prejudice. We think not. We believe that the trial was conducted in a manner which in its ultimate effect was distinctly favorable to the defendant and decidedly unfavorable to the plaintiff. Since the error was one related to the substantial rights of the plaintiff and prejudice was clearly within the range of possibility, a demonstration of prejudice was not required." *Citron*, supra, 377 F.2d at 753.

With the guidance of these decisions and considering the nature of the errors in the case at bar, the substantial rights of the appellants were involved.

E. Summary

The trial court ignored the clear congressional command in disregarding Federal Rule of Evidence 611(b) and patently misused Federal Rule of Civil Procedure 42(b). The Court of Appeals' decision requiring the appellants to demonstrate prejudice under the circumstances of this case is in clear conflict with prior Supreme Court decisions. In order to preserve the integrity of the existing rule governing reversible error, the writ of certiorari should be granted.

CONCLUSION

For the foregoing reason petitioner respectfully requests that this Court grant the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,
HARRY S. WENDER

Attorney for Petitioner

Of Counsel:
DAVID B. KEEFFE,
DESISTI, KEEFFE AND ROSH

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-2114

Lis, Edwin J., Jr., et al.,
Appellants,

v.

The Robert Packer Hospital, et al.

Appeal From The United States District Court For The Middle District Of Pennsylvania
(D.C. Civil No. 76-1196)

Submitted Under Third Circuit Rule 12(6)
April 26, 1978

Before: SEITZ, *Chief Judge,* ALDISERT, *Circuit Judge,* and STERN, *District Judge.**

* Honorable Herbert J. Stern, of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

(Filed June 23, 1978)

ALDISERT, *Circuit Judge.*

The major questions presented in this appeal from an adverse jury verdict in a medical malpractice diversity case concern practices routinely followed by the district judge in his conduct of trials. While we hold that these practices, which relate to cross examination and bifurcation of trial, offend the Federal Rules of Evidence and Civil Procedure and by this opinion explicitly discourage their future use, we do not find reversible error in this case.

I.

Jason Lis was born to appellants Debbie and Edwin Lis on May 18, 1974, at the defendant Robert Packer Hospital in Sayre, Pennsylvania. Dr. John Pacanowski, the infant's pediatrician, is an employee of the defendant Guthrie Clinic, a professional corporation of some 65 physicians who have privileges at the hospital.

On September 19, 1974, at the age of four months, Jason was taken to the hospital's emergency room with breathing difficulties following an episode of possible aspiration of food. He was examined by the defendant Wayne H. Allen, M.D., also a Guthrie employee, who was serving as the hospital's duty physician. Blood work performed at the time of admission revealed an exceptionally high blood sugar level of 367; a normal reading would have been in the 100-120 range. Dr. Allen made a tentative diagnosis of diabetes mellitus with diabetic acidosis and injected 15 units of regular insulin.

Dr. Allen's diagnosis was subsequently proven erroneous; Jason Lis is not diabetic. Shortly after the incorrect diagnosis and insulin injection, Jason began undergoing serious seizures which continued throughout his hospitalization. The child now suffers from severe brain damage and mental retardation, and probably from blindness. A claim was filed against the hospital, the clinic and Dr. Allen.

The trial court, as was its stated general practice, ordered that the case first go to the jury on the issue of negligence. No evidence of damages was permitted. The defense presented nine expert medical witnesses testifying that the seizures experienced by the child and the subsequent serious permanent malfunctions were not the result of the insulin injection but the result of a pre-existing congenital brain disorder. The jury found Dr. Allen to have been negligent, but that his negligence was not the proximate cause of Jason's condition.

Appellants contend that the court erred (1) in permitting cross examination of Dr. Pacanowski, one of their own witnesses, beyond the scope of direct examination; (2) in bifurcating the liability and damages aspects of the trial; (3) in excluding certain evidence; and (4) in interrupting the summation of plaintiffs' attorney to allow defense counsel time to consider whether to move for a mistrial on the basis of improper remarks in plaintiffs' closing argument. We will discuss only the first two assignments of error.[1]

---

[1] We have concluded that arguments (3) and (4) do not present reasons for reversal and do not require discussion.

II.

Appellants presented Dr. Pacanowski's testimony to describe their son's normal development during early pediatric care, his condition at the onset of seizure activity, and other details of Jason's stay at the hospital. Early in the cross examination, in response to an objection by plaintiffs' counsel that the cross examination was exceeding the scope of direct examination, the court stated:

> I did rule, and this will be good for the whole trial—we will permit inquiry in this case into matters beyond the scope of the direct on cross examination as if it were on direct, and we will also permit that for purposes of credibility, too.

Appendix at A-61. Shortly thereafter the court added:

> I have the right to permit inquiry beyond the scope of the direct, and I do it in every case unless it causes confusion. I don't see that it is causing any confusion here, and I have the right to control how the evidence is going to be presented. I think myself it is absurd to call a witness two or three times in a trial, call him on one side and then call him by the other side. I think the thing to do is get all the evidence when he is on the stand. You are not bound by his testimony as far as that goes. Nobody is.

Id. at A-62. It is not disputed that the cross examination exceeded the scope of the direct examination, albeit in this portion of the examination defense counsel were precluded from using leading questions.

A.

Appellants allege that the trial judge's statement, "I have the right to permit inquiry beyond the scope of direct examination and I do it in every case unless it causes confusion", runs a collision course with Federal Rule of Evidence 611 (b):

> (b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit, inquiry into additional matters as if on direct examination.

The rule as adopted by Congress changed the rule submitted to it by the Supreme Court. As submitted, Rule 611 (b) provided:

> A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.[2]

The House of Representatives adopted the present language, the Committee on the Judiciary offering this rationale:

> The Committee amended this provision to return to the rule which prevails in the federal courts and

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[2] H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7085, *and* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 369 (2d Ed.).

thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.[3]

The Senate Committee stated similar views:

> The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.
>
> The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from prospectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes

[3] H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7085-86, *and* Saltzburg & Redden, *supra*, at 369.

> it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.[4]

Clearly then, the Rule in its present form establishes a predictable[5] and orderly procedure for the presentation of the various sides to a dispute. The first sentence of the Rule declares that "[c]ross examination should be limited to the subject matter of the direct examination". The second sentence, affording courts the power to expand the inquiry, clearly contemplates special circumstances.

We agree with appellants that, notwithstanding the trial court's laudable motives, its ruling effectuated neither the letter nor the spirit of Rule 611(b). Simply stated, the Rule does not confer upon a federal judge "the right to permit inquiry beyond the scope of the direct . . . in every case". Rather, the general prescription is precisely the opposite. Any right to counter the stated procedure is granted to the trial court only "in the exercise of discretion". To follow the practice announced by the trial judge in this case is not to exercise discretion; it is to use no discretion whatever.

[4] S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* U.S. Code Cong. & Ad. News 7051, 7071, *and* Saltzburg & Redden, *supra*, at 369-70.

[5] We are reminded of Oliver Wendell Holmes' well-known phrase that "[t]he prophecies of what the courts will do in fact, and nothing more, is what I mean by the law." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897). Holmes, of course, was referring generally to areas of law broader than those relating to the conduct of trials, but the import of his statement remains: the most meaningful system will be one which is sufficiently predictable that lawyers and litigants might make informed decisions as to trial strategy.

B.

We are careful to distinguish between cross examination beyond the scope of direct examination and the act of summoning a witness for one side to become a witness for the other. The latter also occurred in this case, and appellants have assigned as error the district court's decision to permit the defense to qualify Dr. Pacanowski as their witness at the conclusion of their cross examination. Fed. R. Evid. 611 (a) provides:

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

We find no error here. This ruling was discretionary with the trial court, and as long as the defendants were properly limited to direct questions and the plaintiffs were afforded the opportunity to cross examine, as they were, there was neither error nor departure from the Rules in this respect.

Trial courts in this circuit traditionally have accommodated the schedules of expert witnesses. It would exalt form over substance to require a physician to return to a courtroom at a later date, once he has already appeared for one party. Thus, although calling a defense witness out of turn for reception of his testimony during the plaintiff's case in chief may technically disrupt the normal presentation of the case, this decision is committed to the discretion of the trial court. If convinced

that practical reasons justify calling a witness out of turn and that the testimony will not produce undue confusion in the minds of the jurors, experienced trial courts will permit the practice. If it is the product of an informed discretion, the decision will not be disturbed.

III.

Appellants' second argument involves a challenge to another "general practice" of the trial judge. Faced with an objection to his decision to bifurcate the trial and limit the first phase to liability only, the court responded:

> I bifurcated it because we bifurcate all negligence cases, and I think everybody is more fairly treated that way.

Appendix at A-30.

Appellants argue that this general practice of bifurcation flies in the face of Fed. R. Civ. P. 42 (b):

> (b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Specifically, appellants contend that the decision to bifurcate a trial must be made only after the trial court, in the exercise of discretion, weights the various considerations of convenience, prejudice to parties, expedition, and

economy of resources. Thus, the question for decision is whether the trial court's practice of bifurcating *all* negligence cases because it believes "everybody is more fairly treated that way" is sufficient to merit a reversal in this case.

Although it is reported that some district courts have adopted local rules that encourage separation of liability from damages, *see Wright and Miller, Federal Practice and Procedure,* §2390, the rule in this circuit since 1972 has been that the decision to bifurcate *vel non* is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance. *Idzojtic v. Pennsylvania Railroad Co.,* 456 F.2d 1228, 1230 (3d Cir. 1971) ("The district court is given broad discretion in reaching its decision whether to separate the issues of liability and damages. 9 Wright & Miller, Federal Practice and Procedure §2392.")

We are advised that where district courts have adopted a general bifurcation rule, a heated controversy among the commentators and the profession has resulted.[6] Those who favor the trial of liability separate from damages in personal injury actions emphasize the time savings, and also suggest that in theory there should be no difference in the eventual outcome of the case. But an equally impressive argument is advanced that in many cases, especially personal injury negligence cases, the separation might affect the outcome of the case.[7] Although

[6] See references collected in *Wright and Miller, supra,* §2390 nn.53 and 54.

[7] It can reasonably be suspected that the degree of negligence, the contributory negligence of the plaintiff, and other conduct of the parties are presently reflected, with many juries, in the finding of damages as well as the finding of liability. To a purist it probably would seem desirable to put an end to this, but it may be argued that this lends a beneficial flexibility to the strict rules of liability and contributory negligence. At least it should be recognized that separate trials of liability and damages would differ from a single trial in more than form.
Note, *Separate Trial of a Claim or Issue in Modern Pleadings: Rule 42(b) of the Federal Rules of Civil Procedure,* 39 Minn. L. Rev. 743, 760-61 (1955).

cognizant of these competing considerations, this court has heretofore cast its lot with the views expressed by the Advisory Committee that bifurcation "be encouraged where experience has demonstrated its worth", but that "separation of issues for trial is not to be routinely ordered".[8] We adhere to that position. Thus a routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters.

Accordingly, notwithstanding the sincere and conscientious efforts of this distinguished trial judge to institute a set procedure for all cases, we disapprove of a general practice of bifurcating all negligence cases. Because our previous decision in *Idzojtic, supra,* was a per curiam opinion and contains a passage that diluted the clarity of our holding,[9] we wish to reemphasize our view. A general

[8] Advisory Committee's Note to the 1966 Amendment of Rule 42(b), 39 F.R.D. 113.

[9] Although the decision of the case announced the rule of discretion, there was reference to an experimental practice to be followed in the Western District of Pennsylvania without a specific criticism of it. *See* 456 F.2d at 1229.

rule of a district court or district judge bifurcating all negligence cases offends the philosophy that the decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.

IV.

Nevertheless, although the trial court apparently failed to exercise discretion in applying Fed. R. Evid. 611 (b) and Fed. R. Civ. P. 42 (b), we do not reverse in this case because appellants have not persuaded us that they were visited with such prejudice as to entitle them to a new trial. Because of the dearth of case law construing Rule 611 (b) in this court, we hesitate to invoke the draconian remedy of a new trial simply because the trial court followed a certain practice in all cases. For the future, however, it may be that a showing of prejudice will not be necessary to obtain relief from this court where, as here, it is demonstrated that the trial court has failed to heed the congressional command. Trial courts in this circuit can reasonably assume that in future cases this court will treat the congressional formulation as a prophylactic rule which, if not followed, requires the most severe sanction —irrespective of demonstrably prejudicial effect.

Similarly, with respect to the trial court's failure to use an informed discretion to bifurcate in accordance with Rule 42 (b), we have concluded that appellants did not demonstrate prejudice. The serious medical condition of Jason Lis was in fact presented to the jury in the liability phase of the case in the form of cumulative testimony by defense witnesses that the administration of insulin did not significantly contribute to the present condition of the child because of the pre-existing damage to the brain.

The rule requiring the exercise of discretion in our circuit, announced in 1972 and reiterated today, is in the nature of a prophylactic rule. By emphasizing it as extensively as we do now, we suggest that in the future a showing of prejudice may not be necessary to justify a new trial if the trial court fails to support the decision to bifurcate with an explication demonstrating its exercise of an informed discretion in the circumstances of the case.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-2114

Lis, Edwin J., Jr., et al.,

Appellants,

v.

The Robert Packer Hospital, et al.
(D.C. Civil No. 76-1196)

Present: SEITZ, *Chief Judge,* ALDISERT, *Circuit Judge,* and STERN, *District Judge.**

ORDER

It is Ordered that the slip opinion heretofore filed in the above on June 23, 1978, be and the same is hereby amended as follows:

Page 10, last sentence in the pourover paragraph at the top of the page is deleted and the following substituted therefor:

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* Honorable Herbert J. Stern, of the United States District Court for the District of New Jersey, sitting by designation.

A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.

By the Court,
Aldisert
Circuit Judge

Dated: August 8, 1978